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IN THE

Supreme Court of the United States

October Term, 1955

No. 808

GEORGE C. WICKS, *Petitioner,*

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, AND SOUTHERN PACIFIC COMPANY, *Respondents.*

PHILLIP F. JENSEN, *Petitioner,*

v.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND UNION PACIFIC RAILROAD COMPANY, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Alternatively Motion for Leave to File Petition for Writ of Mandamus, and Petition for Writ of Mandamus

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BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOODS

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported but is printed as Appendix C to the Petition. The opinion of the District Court is reported

in 121 F. Supp. 454, and is also printed as Appendix B to the Petition.

JURISDICTION

Petitioners invoke the certiorari jurisdiction of this Court under Title 28, U.S.C., Section 1254(1).

With respect to their alternative motion and petition for a writ of mandamus, Petitioners invoke the jurisdiction of this Court under Title 28, U.S.C. Section 1651(a). We agree that the Court possesses the necessary power under this provision to issue a writ of mandamus in proper cases, but we contend for reasons to be hereafter discussed that this is not a proper case for the issuance of such a writ.

RESTATEMENT OF QUESTIONS PRESENTED

The first question presented for determination is raised by the petition for writ of mandamus. If this is a proper case for such a writ to issue, then the alternative petition for certiorari should be denied for that reason. If, as we shall show, it is not a proper case for mandamus, only then does the question of whether a writ of certiorari should issue become relevant. Accordingly, we shall discuss the questions under our argument in this order.

With respect to the petition for certiorari, Petitioners' statement of the questions presented (pp. 9-10), as well as a major portion of their argument, are so worded as to infer that this Court should pass upon the merits of the constitutional questions which petitioners raised and sought to litigate below. This is a basic misconception of the issue decided by the District Court and Court of Appeals.

We think a proper statement of the question presented by the petition for certiorari is whether the District Court and the Court of Appeals correctly decided that there was no substantial Constitutional issue raised by Petitioners' claim that the union shop amendment to the Railway Labor Act and union shop agreements made pursuant thereto were unconstitutional.

STATUTE INVOLVED

Section 2 Eleventh of the Railway Labor Act (45 U.S.C.A. § 152 Eleventh) in pertinent part provides as follows:

> "Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required

as a condition of acquiring or retaining membership.

* * * * *

"(d) Any provisions in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended." Railway Labor Act, Section 2 Eleventh; 64 Stat. 1238, U.S.C. Title 45, Section 152 Eleventh.)

RESTATEMENT OF THE CASE

Because in our view Petitioners do not adequately present to this Court the facts of the case, we feel that a restatement is required.

In the action brought before the District Court, Petitioners sought to enjoin the defendant railroads[1] from terminating their employment pursuant to provisions of union shop agreements between the Railroads and the Brotherhoods on the ground that these agreements and the provisions of the Railway Labor Act under which they were made (45 U.S.C.A. § 152 Eleventh) are unconstitutional and void (R. 55, 64[2]).

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[1] For convenience and brevity, the respondents Union Pacific Railroad and Southern Pacific Company, will be referred to herein as the "Railroads", and the respondent labor organizations, as the "Brotherhoods".

[2] Record references throughout this brief are to the printed transcript of the record filed in the Court of Appeals, copies of which have been filed with this Court. Because there were no factual differences of substance between the *Wicks* and *Jensen* cases, pursuant to stipulation of the parties only the record in the *Jensen* case was printed on appeal of the judgment of the District Court. The Court of Appeals also consolidated the cases for hearing as presenting identical questions of law, and both Petitioners and the two Brotherhoods filed consolidated briefs in the Court of Appeals as they have in this Court.

The material facts as disclosed by the amended complaint in the District Court (R. 55), and the affidavit attached to the Brotherhood's motion for summary judgment (R. 21), are undisputed. A brief summary of the facts in the *Jensen* case follows:

On March 7, 1953, the Union Pacific Railroad and the Brotherhood of Railway and Steamship Clerks, together with other railroad labor organizations representing non-operating employees, entered into a union shop agreement which became effective on March 31, 1953. A copy of this agreement is attached as Exhibit B to the affidavit submitted with the Brotherhood's motion for summary judgment (R. 36). The union shop agreement was made pursuant to express provisions contained in Section 2 Eleventh of the Railway Labor Act, as amended on January 10, 1951 (45 U.S.C.A. § 152 Eleventh).

At the time the union shop agreement was made, and on its effective date, petitioner Jensen was employed by the Union Pacific Railroad in a clerical position in the craft or class for which the Brotherhood is the duly designated and authorized collective bargaining representative under the Railway Labor Act.

The union shop agreement provides in part that, subject to certain terms and conditions not material here, all employees as a condition of their continued employment shall "become members of the organization party to this agreement representing their craft or class within sixty (60) calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in such organization; . . . ." (R. 36).

On the same date that the union shop agreement was executed, the Brotherhood and the railroad entered into another agreement known as a Memorandum Agreement, also effective on March 31, 1953, and attached as Exhibit C to the Brotherhood's affidavit (R. 48). This Memorandum Agreement provides that any employee in the service of the Railroad on the date of the said agreement who was not a member of the union representing his craft or class, and who will make affidavit that he was a member as of the date of the Agreement of a bona fide and recognized religious group having scruples against joining a union, will be relieved of the obligation to join the Brotherhood and execute the oath of membership and will be deemed to have met the requirements of the union shop agreement by the payment of an amount equivalent to the initiation fees, periodic dues and assessments required for membership by the organization representing his craft or class. As stated in the Brotherhood's affidavit (R. 23), and as admitted in the amended complaint (R. 59), Petitioner failed and refused to comply with the conditions of either the union shop agreement or the Memorandum Agreement, assigning as his reason therefor religious beliefs incompatible with their requirements.

Pursuant to the provisions of the union shop agreement, the Brotherhood notified the Railroad of Petitioner's non-compliance and requested the termination of his employment. Petitioner was granted a hearing and all appeal procedures provided by Section 5 of the agreement were exhausted (R. 38-42), the final step of which was a decision of a neutral arbitrator appointed by the National Mediation Board. This decision was rendered on January 27, 1954, by

Arbitrator Edgar L. Warren, who found that Petitioner had not complied with the terms of the union shop agreement, and held that in accordance with its requirements, his seniority and employment would be terminated within ten (10) days of the arbitrator's decision. A copy of the opinion of the arbitrator is attached as Exhibit A to the Brotherhood's affidavit (R. 25-35). On February 2, 1954, the Railroad notified Petitioner that effective February 5, 1954 his employment would be terminated (R. 60), whereupon action was instituted by the filing of a complaint in the District Court (R. 6). An ex parte temporary restraining order was obtained (R. 18, 19).

A motion for summary judgment was filed by the Brotherhood (R. 20), to which affidavits and exhibits were attached (R. 21-50), upon which comment has been made above. In support of the motion for summary judgment, the Brotherhood took the position that if the action could be deemed to present a substantial constitutional question, it was one upon which hearing and determination by a three-judge court was required, but if the claim were unsubstantial and obviously lacking in merit as contended by the Brotherhood, it was subject to dismissal by a single judge.

The Railroad filed an answer to the complaint in which it denied allegations of unlawfulness and illegality, and requested dismissal of the action (R. 66-71).

On May 26, 1954, District Judge Ben Harrison filed a written opinion (R. 74-81)[3] in which he concluded that there was no substantial constitutional question presented requiring a three-judge court and deter-

[3] Also attached as Appendix B to the Petition.

mined that the applications for injunctive relief should be denied, the temporary restraining order vacated, and the motion for summary judgment granted (121 F. Supp. 454). Pursuant to this opinion, findings of fact and conclusions of law, as amended, (R. 81-89), together with a judgment of dismissal (R. 90-91) were entered on June 10, 1954.

On appeal the judgment of the District Court was unanimously affirmed by three judges of the United States Court of Appeals for the Ninth Circuit, and an opinion filed by that court on March 6, 1954.[4] Petitioners' contentions with respect to the jurisdiction of this Court to issue a writ of mandamus were raised for the first time during oral argument before the Court of Appeals, were the subject of supplemental briefs by the parties to that court, and were rejected by it as without merit.

ARGUMENT

I.

THE MOTION AND PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED

As stated above, we believe that the first question for discussion is the issue raised by petitioners' alternative motion for a writ of mandamus. In substance, the contention here advanced by petitioners is that decisions of this Court establish that where a single district court judge is presented with a complaint in which injunctive relief is sought on the basis of asserted unconstitutionality of an Act of Congress, and application for a three-judge court is refused by the single district judge and the case dismissed

[4] The opinion of the Court of Appeals is as yet unreported, but is set forth as Appendix C to the Petition.

on the ground that the constitutional question sought to be raised is unsubstantial, appeal does not lie to the Circuit Court of Appeals but should be made directly to this Court for a writ of mandamus directed to the district judge requiring him to assemble a three-judge court to hear the case (Pet., p. 6).

As set forth above in our Restatement of the Case, the complaints filed in the District Court sought the issuance of injunctions, preliminary and permanent, enjoining the termination of Petitioners' employment because of alleged unconstitutionality of the union shop amendment to the Railway Labor Act. We concede that it is well established that federal law requires hearing and determination by a statutory three-judge court before such relief may be *granted.* However, it is equally well established by decisions of this Court that it is the duty of a single district judge first to determine whether the constitutional issue sought to be presented is substantial before invoking the three-judge court procedure. If it is determined that the complaint does not present a substantial constitutional question, a single district judge may deny the relief sought on that ground and dismiss the action. Such lack of a substantial question may be apparent because the asserted unconstitutionality is either "frivolous" or "obviously without merit". *Ex parte Poresky,* 290 U.S. 30; *William Jameson & Co.* v. *Morganthau,* 307 U.S. 171 (*California Water Serv. Co.* v. *City of Redding,* 304 U.S. 252).

The District Court adopted this view when it held as a matter of law that since the allegations of the amended complaint failed to present any substantial ground for granting the injunctive relief requested, the statutory three-judge court procedure was not ap-

plicable. In so holding, the District Court relied upon an identical determination in an opinion by Judge Learned Hand of the United States Court of Appeals for the Second Circuit in *Otten* v. *Baltimore & Ohio R. Co.*, 205 F. 2d 58, 60.

Petitioners assert that this holding is contrary to the decisions of this Court in *Stratton* v. *St. Louis S. W. Ry Co.*, 282 U.S. 10, *Ex parte Poresky*, 290 U.S. 30, and *Ex parte Collins*, 277 U.S. 565, and also is in conflict with the decision of the Court of Appeals for the 7th Circuit in *Waddell* v. *Chicago Land Clearance Commission*, 206 F. 2d 748.

None of these decisions is authority for the proposition for which they are cited. *Ex parte Collins* is totally inapplicable and needs no further comment. Each of the other three cases is authority for the point that a single district judge may not exercise jurisdiction which is established by statute as that of a three-judge court only, and that if the single judge does so exceed his jurisdiction the remedy to correct the error is by writ of mandamus to the United States Supreme Court. In other words, the writ of mandamus has been employed traditionally by this Court to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so.

But that is not the case here. As we shall show, there was no erroneous exercise by the district court judge here of jurisdiction properly belonging to a three-judge court. Petitioners apparently concede that it is within the jurisdiction of a single district judge to determine if asserted unconstitutionality of a federal statute presents a substantial question (Pet.

p. 5). Despite this concession, petitioners go on to argue that appeal from a refusal of a single district judge to convene a three-judge court does not lie to the Court of Appeals but should be sought by mandamus from this Court. We shall show that it is only when jurisdiction is erroneously assumed that the remedy is by way of mandamus, not when jurisdiction properly assumed may be followed by an erroneous judgment. In short, resort to mandamus will lie to require the proper exercise of jurisdiction but will not be used to direct the exercise of judgment or discretion in a particular way.

The distinction we are making is illustrated by the very cases upon which petitioners rely. It is not true, as asserted by petitioners (Pet p. 8) that both the *Stratton* and *Waddell* cases "involve action of a single district judge analogous to that in the instant case". In the *Stratton* case suit was brought by a railroad to restrain the enforcement of a state statute on the ground that it was repugnant to the Constitution of the United States. A single district court judge not only granted a temporary restraining order, but entertained a motion to dismiss the case on the merits. Upon hearing on the merits, the district judge entered a decree dismissing the bill. On appeal, the Court of Appeals reversed and remanded the case with directions to enter a decree in accordance with the views expressed in its opinion. Appeal was taken to this Court and it was held that the single district judge *had exercised jurisdiction which could properly be exercised only by a court of three judges.* The specific jurisdiction which the district judge had erroneously exercised was permitting the restraining order to operate as a interlocutory injunction for several months

and also his consideration of the case on the merits and subsequent dismissal. This Court held that such action belonged under the statute only to the three-judge court; that therefore the district judge had no jurisdiction; and, accordingly, neither did the Court of Appeals to entertain an appeal therefrom. The Court then went on to say that the remedy from an improper exercise of jurisdiction by a single district judge was by a writ of mandamus to this Court. On the other hand, the Court carefully pointed out in the course of its opinion that the three-judge court jurisdiction attaches "only where there is a substantial claim of invalidity under the Federal Constitution". (282 U.S. 10 at 15). Accordingly, Petitioners misconceive the point of this Court's decision in the *Stratton* case when they say it involved the same action by a single district judge as that taken in the instant case.

The distinction between the action taken in the *Stratton* case and the action taken by the district judge in the present case is well illustrated by this Court's decision in *Ex parte Poresky,* 290 U.S. 30, the decision of which was rendered for the Court by Mr. Chief Justice Hughes who also had delivered the earlier opinion in the *Stratton* case. Poresky had filed a petition for a writ of mandamus to require a single district judge to assemble a three-judge court to hear and determine his application for an interlocutory injunction to enjoin enforcement of a state statute on the ground that it violated the Constitution of the United States. In reviewing the action below, the Supreme Court again pointed out that a single judge did not have jurisdiction to dismiss a complaint on the merits (p. 31), but it also pointed out that before the jurisdiction of a three-judge court attached, it was necessary that a substantial constitutional question

be presented. It further held that a single district judge clearly has the authority to dismiss a case when there is no substantial claim presented (pp. 31-32). Such was the authority, the Court said, which the district judge had exercised in the *Poresky* case, and for this reason there had been no erroneous exercise of jurisdiction by a single district judge. Accordingly, it denied the motion for leave to file a petition for writ of mandamus (p. 32).

The *Poresky* case is directly in point with the problem here under consideration. By its specific action of denying the motion for leave to file a petition for writ of mandamus in the *Poresky* case, this Court has clearly held that such a writ will lie only where the district judge *exceeds his jurisdiction* and not where he is properly exercising jurisdiction even though he may reach an erroneous conclusion that the bill of complaint fails to present a substantial question.[5]

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[5] The decision of the 7th Circuit Court of Appeals in *Waddell* v. *Chicago Land Clearance Commission*, 206 F. 2d 748, also does not support petitioners' contentions. There the court held that the determination of whether a substantial federal question is presented is within the jurisdiction of a single district judge. It also significantly pointed out in the course of its opinion that previous attempts of the appellants to have this Court issue a writ of mandamus to require the district judge to expunge his order of dismissal and convene a three-judge court were unsuccessful. (206 F. 2d 748 at 750). Clearly this Court denied the writ of mandamus in the *Waddell* case for the same reason it was denied in the *Poresky* case—because the single district judge was acting within his proper jurisdiction in holding that the constitutional question sought to be presented was unsubstantial. Petitioners do not inform this Court in their discussion of the *Waddell* case that the Court of Appeals actually held that the appeal was subject to dismissal not because it did not properly lie from the action of a single district judge, but because it had not been filed within the time allowed under the rules of the court. (p. 751)

In the instant case, as in the *Poresky* case, a single district judge determined that the complaint did not present a substantial constitutional question and he, therefore, denied the application for a three-judge court and dismissed the action. In so holding, the single district judge was clearly exercising jurisdiction which was properly his and not that of a three-judge statutory court. *Ex parte Poresky,* 290 U.S. 30, 32; *California Water Serv. Co.* v. *City of Redding,* 304 U.S. 252; *William Jameson & Co.* v. *Morganthau,* 307 U.S. 171. He did not entertain the case on the merits, as was done by a single district judge in the *Stratton* case, nor did he grant a temporary or permanent injunction—acts which are within the exclusive jurisdiction of a three-judge court. On the contrary, Judge Harrison denied the application here both for interlocutory and permanent injunctive relief and granted the motion for summary judgment of dismissal. It is true that Judge Harrison issued a temporary ex parte restraining order (R. 18, 19), but it is clear under the three-judge court statute itself that such action is within the jurisdiction of a single district judge, 28 U.S.C.A., Section 2284(3). Upon hearing of the application for temporary injunction and defendant's motion for summary judgment, Judge Harrison determined that the complaint failed to present a substantial constitutional question. He thereafter rendered a judgment of dismissal in which he specifically vacated the temporary restraining order (R. 91).

Consequently, it is perfectly clear from the decisions of this Court that petitioners' contentions on the jurisdictional issue are erroneous and that their motion for leave to file a petition for writ of mandamus should

be denied. It is also clear that petitioners' appeal to this Court is predicated not on the fact that the single district judge improperly exercised jurisdiction when he decided that the constitutional question presented by the complaint was unsubstantial, but rather on the basis that the District Court was in error in Petitioners' view in reaching that conclusion. The proper procedure was by appeal to the Court of Appeals, which was the action taken.

II.

THE DISTRICT COURT AND COURT OF APPEALS WERE CLEARLY CORRECT IN HOLDING THAT THE COMPLAINTS FAILED TO PRESENT A SUBSTANTIAL CONSTITUTIONAL ISSUE.

It is our position that an analysis of the allegations of the amended complaint (R. 55-65) and of the statutory and constitutional provisions invoked clearly shows that the constitutional questions raised are entirely lacking in substance. The action which Petitioners seek to have enjoined is the operation and performance of union shop agreements between the Railroads and the Brotherhoods. Examination of the statutory provisions which expressly authorize such agreements plainly discloses the lack of merit in the asserted unconstitutionality.

Prior to 1951, Section 2 Fifth of the Railway Labor Act (45 U.S.C.A. Section 152 Fifth) prohibited union shop agreements. By Section 2 Eleventh, enacted in 1951, this prohibition was repealed so that union shop agreements may now be made in the railroad industry within certain limitations prescribed by the statute. Consequently Petitioners' contention that the Union Shop Amendment is unconstitutional amounts to no more than a claim that they have a constitutional

right to have Congress continue to prohibit such agreements. Such a claim is clearly without substance or merit. This was the precise holding of the United States Court of Appeals for the Second Circuit, in *Otten* v. *Baltimore & Ohio R. Co.*, 205 F. 2d 58. In that case, the facts of which are almost identical to those here presented, Judge Learned Hand reasoned that the enactment of the Union Shop Amendment to the Railway Labor Act amounted to a repeal of the pre-existing prohibition of union shop agreements in Section 2 Fifth, and that "there can be no plausible argument that to repeal such a statute was unconstitutional" (p. 60). The District Court and Court of Appeals expressly agreed with and adopted this holding in the opinions below (Pet., App. C, p. 18; App. B, pp. 5-6).

It is true that Judge Hand went on to say that the Union Shop Amendment might be said to have affirmatively legalized union shop agreements if they were invalid at common law, and that under such circumstances a challenge to the constitutionality of the Amendment might not be considered "insubstantial". However, he further reasoned that such a possibility was not involved so far as the State of New York was concerned because of the fact that union shop agreements were valid under the common law of New York. As the courts below observed in their opinions (R. 77; Pet., App. C, pp. 20-21), there is likewise no prohibition at common law in California of union shop agreements. *Colgate-Palmolive-Peet Co.* v. *National L. R. Bd.*, 338 U.S. 355, 361; *J. F. Parkinson Co.* v. *Building Trades Council*, 154 Cal. 581, 98 Pac. 1027; *Schafer* v. *Registered Pharmacists Union*, 16 Cal. 2d 379, 106 P. 2d 403; *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329.

Accordingly the decisions below, like that of the *Otten* case, were clearly correct in holding that the asserted unconstitutionality of the federal law is obviously without merit because there is no common law prohibition of union shop agreements in California which the federal law can be said to supersede,[6] even though it is quite clear on the face of the statute that any such law, if it existed, has been superseded.

III.

THE REASONS ASSIGNED BY PETITIONERS FOR GRANTING THE WRIT OF CERTIORARI ARE WITHOUT MERIT.

Petitioners assign five separate reasons why the writ should be granted, as follows:

(1) The Courts below have erred in their decision that there is no governmental action in this case and their holding is in conflict with decisions of the highest courts of two states and with previous expressions of this Court (Pet., pp. 16-36);

(2) If Petitioners are discharged from employment because of their refusal to join a union, they

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[6] In this connection, the District Court stated in its opinion (R. 77-78) that certain holdings of the state courts in Texas and Nebraska, to the effect that the Union Shop Amendment to the Railway Labor Act was beyond the legislative power of Congress, have not been overlooked, but that it was not in accord with the views stated in those decisions because "of the difference in the laws of the states involved, assuming that the state laws can control an act of Congress in this field".

The decision of the Texas court referred to by the District Court was reversed on appeal (*International Association of Machinists, et al.* v. *Sansberry, et al.*, 277 S.W. 2d 776), and the Nebraska decision is now on appeal to this Court and pending decision. *Railway Employes' Department AFL et al.* v. *Hanson, et al.*, No. 451, October Term 1955.

will have been denied the freedom of religion guaranteed to them by the First Amendment to the federal Constitution (Pet., pp. 36-42);

(3) If Petitioners are discharged from employment because of their refusal to join a union, they will have been denied the right to work and freedom of association guaranteed to them by the First and Fifth Amendments to the Constitution (Pet., pp. 43-48);

(4) If Petitioners are discharged from employment because of their refusal to join a union, they will be deprived of their property, in violation of the due process clause of the Fifth Amendment (Pet., pp. 49-50); and

(5) Whether or not union membership shall be made a nationwide condition of railroad employment is not simply a question of policy to be settled by Congress in the exercise of its legislative discretion (Pet., pp. 50-51).

Only the first of these five asserted reasons for granting the writ requires a reply; the other four reasons are all addressed to constitutional guarantees and limitations which do not arise as issues in this case. If, as held by the courts below and contended by Respondent Brotherhoods here, the action involved in the making of union shop agreements authorized by the statute is private action and not governmental action, it is too well established to require extended discussion that the constitutional rights asserted by petitioners have nothing to do with limitations which may be imposed on the personal freedom of individual employees by action of employers as the result of contracts between private parties. *Corrigan* v.

Buckley, 271 U.S. 323; *Civil Rights Cases,* 109 U.S. 3, 11; *United States* v. *Harris,* 106 U.S. 629, 639; *Hodges* v. *United States,* 203 U.S. 1, 18; *Shelley* v. *Kraemer,* 334 U.S. 1, 9.

Accordingly we shall address ourselves to Petitioners' contention that the making and execution of union shop agreements pursuant to Section 2 Eleventh of the Railway Labor Act is governmental action not that of private parties.

First of all, Petitioners assert (pp. 16-17) that the decisions below are in conflict with the decision of the Nebraska Supreme Court in *Hanson* v. *Union Pacific R.R. Co.,* 160 Neb. 669, 71 N.W. 2d 526, a case which is now before this Court on appeal (No. 451), and *Betts* v. *Easley,* 161 Kans. 159, 169 P. 2d 831.

Although we think that the decision of the Nebraska court in the *Hanson* case was entirely erroneous for reasons which have already been submitted to this Court by appellants in that case, even as its stands it provides no support for the position of Petitioners here. Contrary to Petitioners' contention that the Nebraska court rejected the holdings of the courts below, the Nebraska court agreed that were it not for the fact that the Union Shop Amendment to the Railway Labor Act expressly supersedes all state right-to-work laws, it would not raise constitutional issues. On this point the Nebraska Supreme Court expressed itself as follows:

> "However, the labor organizations contend that Congress, by the amendment, merely repealed the restrictive provision put in the Act in 1934; that Congress, by doing so, did not make any change in the terms and conditions of the employment of appellees; that impairment of

rights, if any resulted therefrom, was brought about by private union shop agreements permitted as a result of the amendment; and that such private agreements were enforcible.

* * * *

"We agree with appellees. *If Congress had merely repealed the restrictive provision of the 1934 Act then the labor organizations' position would be correct.* But to do so would have left 17 states with restrictive laws as to union shops. These laws Congress affirmatively sought to strike down. Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 states are concerned for without it such contracts could not be enforced therein." [Italics supplied]

While we firmly believe that the foregoing conclusion by the Nebraska court proceeds upon the specious assumption that the superseding of state laws creates federal compulsion of union membership and therefore is erroneous, we cite the holding of the Nebraska court here only to show that it does not support the contention of Petitioners in the present case where no state right-to-work law is involved.

Similarly, the case of *Betts* v. *Easley, supra,* does not support Petitioners' contention that the making and enforcement of union shop agreements involves governmental action. That case did not involve activity of a railway labor organization in the negotiation of agreements with carriers. It was concerned with the exclusion from union membership of Negroes whose right to a job depended upon their maintaining such membership. This particular state decision has little weight in the determination of the construction of a federal statute. The decisions of this Court

with respect to racial discrimination by railway labor organizations turn not on constitutional issues but upon failure to comply with the requirements of the Railway Labor Act itself. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192.

Petitioners' reliance upon *Shelley* v. *Kraemer*, 334 U.S. 1, *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, and *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515, is similarly misplaced. In the *Shelley* case this Court re-affirmed the doctrine of *Corrigan* v. *Buckley*, 271 U.S. 323, to the effect that agreements between private parties do not give rise to constitutional issues. The Court merely recognized in the *Shelley* case that if one of the contractors attempted to use an arm of Government—the courts to enforce the agreement—governmental action was then involved. The *Pollak* case involved a suit primarily directed at the District of Columbia Public Utilities Commission and an order of that Commission dismissing its investigation of arrangements of the local transit company for provision of music in its public vehicles. From this the Court found a sufficiently close relationship between the Government and the radio service to consider constitutional issues which had been raised. In so stating this Court observed that it relied particularly upon the fact that an order had been issued by the Commission. In the *Virginian* case, the Court was dealing with direct governmental action against a carrier, i.e., the requirement that it bargain with respect to wages, hours, and working conditions. The present case is distinguished by the fact that the making of the union shop agreement was not the direct result of any *requirement*

of the statute but rather voluntary action by private parties.

The remainder of Petitioners' argument (pp. 18-36) is an attempt to construe the statute as if it were a direct compulsion by the Government of union membership rather than a partial relaxation of its pre-existing ban on any type of union security agreement. Various arguments are used by Petitioners to reach this result, such as (1) the fact that the statute supersedes all conflicting state law; (2) the affirmative legalization of union shop agreements by the express provision that they "shall be permitted"; (3) the limitations placed by Congress on the type of union shop agreement which may be made; and (4) the fact that the Union Shop Amendment is an integral part of an Act which regulates railroad labor relations.

None of these arguments establish the proposition that the statute represents governmental compulsion of union membership or that the union shop agreements made under the authority granted by the statute are the result of action of the Government rather than private parties.

A federal statute does not become the equivalent of a law directly requiring union membership simply because it permits private parties to make an agreement containing such a requirement. The difference is apparent and by no means confined to union security agreements. For example, the Railway Labor Act provides that carriers and their employees shall exert every reasonable effort to make and maintain agreements governing rates of pay, rules, and working conditions. Admittedly federal regulation is involved in

directing that these matters be subject to private negotiation and agreement. But it has never been suggested that the rates of pay, rules, and working conditions agreed upon are subject to the constitutional limitations which would be applicable if Congress sought to directly prescribe the rates of pay, rules, or working conditions. Compare *Wilson* v. *New*, 243 U.S. 332.

Moreover, deprivation of individual rights because of labor agreements with employers is certainly not confined to a union shop agreement. Thus a collective bargaining agreement covering wages necessarily destroys the power of an individual employe in the bargaining unit to negotiate a separate wage agreement with the employer. This is so regardless of whether the individual employee is a union member and regardless of whether his talents entitle him to greater remuneration than that provided by the collective bargaining agreement. See *O.R.T.* v. *Railway Express Agency*, 321 U.S. 342, 346; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 337-338.

With the exception of the *Hanson* case, supra, decided by the Nebraska Supreme Court, all other courts which have considered this question have decided it adversely to the contention herein advanced by the Petitioners. *Otten* v. *Baltimore & O. R. Co.*, 205 F. 2d 58, 60 (2d Cir., 1953); *In Re Florida East Coast Ry. Co.* (not officially reported), 32 LRRM 2533 (S.D. Fla., 1953); *Hudson, et al.* v. *Atlantic Coast Line, et al.*, 242 N.C. 650, 89 S.E. 2d 441 (1955); *International Association of Machinists* v. *Sansberry, et al.*, 277 S.W. 2d 776 (1954); *Moore* v. *C. & O. Ry. Co.* (not officially reported), 34 LRRM 2666 (1954).

Accordingly there is little substance to Petitioners' lengthy argument that it is governmental action which they seek by their complaints to enjoin and not that of private parties. Although, admittedly, union shop agreements in the railroad industry depend for their validity on Section 2 Eleventh of the Railway Labor Act, it certainly does not follow that the statutory provision should be interpreted as compelling such agreements to be made.[7] If this argument were sound, every agreement between a railroad labor organization and a carrier would constitute governmental action, and the same would be true of every agreement negotiated by any labor organization with any employer since labor relations in the United States are now generally governed by statute, either federal or state. Non-union employees are under no obligation to join the union representing their class or craft unless and until the carrier employing them agrees to operate on a union shop basis. Neither railway labor organizations nor carriers are *required* by the statute to sign union shop agreements. Certainly this is the way in which the language used in the statute was regarded by the Congress which passed it. The legislative history of Section 2 Eleventh clearly demonstrates that the statutory provision is permissive in nature and

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[7] Petitioners are further in error in contending that the Railway Labor Act enables railway labor organizations to enforce their demands by strikes. The right to strike is derived from the common law and not from the Railway Labor Act, which is entirely silent on the subject.

merely removes preexisting restrictions, federal and state, on the collective bargaining process.[8]

Moreover, it should be emphasized that in the instant case neither the Union Shop Amendment to the Railway Labor Act nor the agreements executed pursuant thereto by the Brotherhoods and the Railroads prevented Petitioners from working for the Railroads. The only obstacle was their own unwillingness either to join the union or to pay the equivalent of initiation fees, dues, and assessments. Similarly, neither Section 2 Eleventh nor the union shop agreements forced Petitioners even to do this. They relinquished their jobs because they found joining the union or paying the equivalent of initiation fees, dues, and assessments too high a price to meet. In either case, the choice is left up to the Petitioners themselves who must weigh the advantages of continued employment with the Railroads against the disadvantages of compliance with the Union Shop or Memorandum Agreements. The choice may be difficult for Petitioners but the statute does not, for that reason, become unconstitutional. As a matter of fact, unless prohibited by law or precluded by contract from doing so, the Railroads themselves could require Petitioners to make such choice even in the absence of a union shop agreement. It is difficult for us to see how the requirement to join a union becomes unconstitutional when it is imposed by the Railroads not because of unilateral action on their

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[8] For example, see S. Rep. No. 2262, 81st Cong., 2d Sess., p. 2, wherein the following is stated: "The bill would not require the execution of union-shop agreements; it merely permits the carriers and the representatives of their employees, through the voluntary process of collective bargaining, to include the union-shop provisions in their collective-bargaining agreements."

part but rather through agreement with labor organizations as authorized by the Railway Labor Act.

In this connection it might be well to again invite the Court's attention to the Memorandum Agreements (previously referred to in our Statement of the Case) which were executed by the Brotherhoods and the Railroads and which have special application to the Petitioners in this case. Under usual circumstances the terms of a union shop agreement require employees to join the union and execute the oath of membership as a condition of their continued employment. However, the Brotherhoods here involved did not see fit to enforce strict adherence to these terms in connection with those persons who hold *bona fide* religious beliefs incompatible with such membership. In an effort to make it possible for Petitioners and others like them to continue in employment without offending their religious scruples, the Brotherhoods sought to make special arrangements for them. They did not feel that they could, in fairness to all other employees in the crafts which they represented who were required by the union shop agreement to assume all the obligations of membership, exempt Petitioners from all obligations. As shown by the exhibit attached to the Brotherhood's affidavit which is set forth as Exhibit C in the printed transcript of record (R. 48), Petitioners and other members of *bona fide* religious sects holding similar views were exempt from all requirements of membership except the payment of amounts equivalent to initiation fees, dues, and assessments. In short, all Petitioners were required to do was to share with their fellow employees the costs of providing representation to all members of the crafts. With specific reference to this phase of the case, the District

Court below made the following statement in its opinion (R. 78-79):

> "Assuming by way of argument that there were congressional action present here, still the protection of the First Amendment could not be validly invoked by these plaintiffs. That amendment protects against prohibitions. This feature of the case is similar to a case recently decided by the Court of Appeals for the Seventh Circuit. [*Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879 (1954); (cert. applied for 22 Law Week 3296).][9] In that case a group engaged in religious work claimed to be exempt from the coverage of the Fair Labor Standards Act on the ground that to subject it to the Act would be to prohibit the free exercise of religion. This claim was rejected, the Court saying: 'We think that all of the above cases on which the Defendant relies [cases in fact involving prohibitions on the free exercise of religion] are distinguishable from the instant case. The Act does not in this case prohibit the free exercise of religion. * * *' Nor can it be said that the plaintiffs' right to worship as they see fit has been prohibited or restricted before this court."

We believe that the foregoing sufficiently demonstrates that the District Court and the Court of Appeals were entirely correct in their conclusions—consistent with those of Judge Learned Hand in the *Otten* case—that the complaints filed by Petitioners failed to present a substantial constitutional question.

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[9] On June 7, 1954, the United States Supreme Court denied certiorari, 347 U.S. 1013, 98 L. Ed. 1136.

CONCLUSION

For the foregoing reasons we respectfully submit that both the Motion for Leave to File a Petition for Writ of Mandamus and the Petition for a Writ of Certiorari should be denied.

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
Washington 5, D. C.

SCHOENE & KRAMER
1625 K Street, N.W.
Washington 6, D. C.

IRL D. BRETT
453 S. Spring Street
Los Angeles, Calif.

P. H. MCCARTHY, JR.
518 Balboa Bldg.
San Francisco, Calif.

JAMES L. CRAWFORD
1015 Vine Street
Cincinnati 2, Ohio

LESTER P. SCHOENE
MILTON KRAMER
1625 K Street, N. W.
Washington 6, D. C.

CLARENCE MULHOLLAND
741 National Bank Bldg.
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
620 Tower Bldg.
Washington 5, D. C.

Attorneys for Respondent Brotherhoods.

Dated at Washington, D. C.
April 27, 1956

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IN THE

Supreme Court of the United States

October Term, 1955

No. 808

GEORGE C. WICKS,

Petitioner,

vs.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, AND SOUTHERN PACIFIC COMPANY,

Respondents.

PHILLIP F. JENSEN,

Petitioner,

vs.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND UNION PACIFIC RAILROAD COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND ALTERNATIVELY MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, AND PETITION FOR WRIT OF MANDAMUS.

PETITIONERS' REPLY MEMORANDUM.

Respondents' brief in opposition to certiorari treats only two aspects of the problem raised in this case. They confine their attention to the questions whether (1) mandamus lies in a case of this character, and (2) whether the object of complaint involves governmental action so as to bring to bear the restraints of the Bill of Rights. This accords with their concessions elsewhere that if there is government action here the Union Shop Statute must be held unconstitutional.

1. An Application for Mandamus Does Lie in This Case.

Although it may not be immediately apparent from respondents' brief in opposition, it can be demonstrated that the area of disagreement between them and petitioners as to whether mandamus lies is really very small. And when that area is understood it is an easy matter to show the correctness of petitioners' contention that application for mandamus to this Court is the proper avenue of review in this case.

Respondents say that petitioners concede that when a three-judge court is sought in a suit under 28 U. S. C., §2282 challenging the constitutionality of a federal statute a single district judge may decline to convene such a court on the ground that the constitutional questions asserted are patently lacking in substance.

That is correct.

Respondents also say that petitioners' contention is that when a single district judge refuses to convene a three-judge court on the ground that the constitutional questions raised are obviously lacking in merit the remedy is a direct application to this Court for a writ of mandamus rather than an appeal to a Court of Appeals.

That is likewise correct.

Respondents' contention is that mandamus lies only in a case where a single district judge exceeds his jurisdiction and takes action which could only properly be taken by a three-judge court.

That is also not only correct but it is precisely what petitioners have themselves urged.

It is apparent then that the only point of difference between the parties on this branch of the case is whether the district judge properly exercised the jurisdiction vested in him by the law. That, in turn, depends upon whether the judge was correct in ruling that no substantial constitutional issues are raised by the pleadings in this case. If, as petitioners urge, such questions are raised, then the single district judge was without jurisdiction to deny their application for a three-judge court and, even under respondents' manner of stating the applicable rule, this Court has jurisdiction to issue a writ of mandamus compelling the convening of a three-judge court. It is not a question of this Court's interfering with discretionary action on the part of the trial judge, for if he erred in his finding that there are no substantial constitutional issues presented here then he was totally without jurisdiction to dismiss petitioners' complaints and decline to convene a three-judge court.

But, if, as respondents contend and petitioners deny, the district judge was correct in his determination that that the pleadings herein present no substantial constitutional questions, this Court has jurisdiction to deny petitioners' application for mandamus.

But—and this appears to be the point eluding respondents—before this Court can grant or deny petitioners' application for mandamus it must first determine whether or not the questions raised are substantial. If, as we believe, the questions are substantial, then the writ must issue.

Ex parte Poresky, 290 U. S. 30, and *Ex parte Collins*, 277 U. S. 565, show that mandamus is the proper avenue of review here. Although, as respondents say, the Court denied a writ of mandamus in each of those cases, the significant thing to be derived from them for present pur-

poses is that in each the Court passed on the application for mandamus on its merits. If the Court lacked jurisdiction to consider the applications it would have ordered them dismissed for want of jurisdiction. But by entertaining the applications on their merits, the Court confirmed petitioners' contention that mandamus lies here.

With reference to the issue of substantiality of the constitutional questions asserted, petitioners submit that No. 451, *Railway Employees' Department v. Hanson,* conclusively settles that they are indeed substantial.

2. Governmental Action Is Involved in Petitioners' Threatened Discharge From Employment.

Respondents contend that petitioners' discharge from employment will be due solely to private action. Relying upon the holding of the United States Court of Appeals for the Second Circuit in *Otten v. Baltimore & Ohio R. Co.,* 205 F. 2d 58, they say, at pages 15-16 of their brief in opposition, that Section 2, Eleventh, merely repealed the previous prohibition of union shop agreements contained in Section 2, Fifth, of the Railway Labor Act. They charge that petitioners' contention that the Union Shop Amendment is unconstitutional "amounts to no more than a claim that they have a constitutional right to have Congress continue to prohibit such agreements."

The emptiness of respondents' argument that a man discharged for refusing to join a union as required by a union shop agreement sanctioned by Section 2, Eleventh, of the Railway Labor Act, has been injured only by purely private action, is clearly reflected in its palpable inconsistency with respondents' concession, at page 24 of their brief, that: ". . . [A]dmittedly, union shop agreements in the railroad industry depend for their validity on Sec-

tion 2, Eleventh of the Railway Labor Act. . . ." How could it possibly be that a statute which is absolutely essential to breathe validity into the union shop agreements involved here can be characterized as a mere repealer?

Respondents' concession apart, it is clear that the Union Shop Statute is more than a mere repeal of the previous ban against all forms of compulsory unionism in Section 2, paragraphs Fourth and Fifth, of the Act. To be sure, the Statute does amend Section 2, paragraphs Fourth and Fifth, to the extent that they conflict with its provisions, but on its face the Statute goes further and accomplishes a great deal more.

The Statute is a partial repeal of other provisions of federal law. For instance, to the extent that it authorizes specified union shop agreements, it repeals that portion of the declaration of policy in the Norris-La-Guardia Act which specifies that the unorganized worker should be "free to decline to associate with his fellows. . . ." (29 U. S. C. §102.)

The Statute is also plainly an affirmative legalization of a particular form of union shop agreement. It specifies that such agreements "shall be permitted," and goes on to prescribe very carefully the particular terms and conditions of the type of agreement authorized.

And, when read in conjunction with Section 2, paragraphs Fourth and Fifth, the Statute constitutes a complete preemption and continuing regulation of the field of compulsory unionism in the railroad industry. It states that agreements authorized by its provisions shall be allowed notwithstanding any state law to the contrary. Thereby it not only swept aside a substantial body of state law proscribing all forms of compulsory unionism in

force at the time of its enactment, but also headed off the application to railroad workers of any subsequent state law of the same character.

Petitioners submit that the Union Shop Statute cannot fairly be treated as "permissive." It is much more than that even on its face. It makes the union shop a legitimate collective bargaining objective, and sweeps aside all conflicting laws, state and federal. When it was enacted, the legal and economic power of the unions was such as to make inevitable the attainment of their goal of universal compulsory union membership. This was known to Congress when it passed the Statute and has been indisputably confirmed by subsequent events. As this Court said in *Collins v. New Hampshire,* 171 U. S. 30, 33-34:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. *In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.*" (Emphasis supplied.)

See also *Terry v. Adams,* 345 U. S. 461, 469.

Whether or not compulsion was exerted against the railroads in the making of the union shop agreements involved in this case, there is not the slightest pretense that the resulting agreements were voluntary on the part of objecting employees. The purpose of the unions and the theory of the Statute is that such employees, including petitioners, are to be forced into union membership or into paying their money to a union or, in the alternative, fired from their jobs which are their means of livelihood. From a realistic viewpoint, there are four parties to the

union shop agreements involved here—the government, the employer, the union, and the employees—and the whole controversy concerns the efforts of the unions, with governmental assistance, to coerce not only the employer but thousands of employees into the compulsory unionism arrangements involved.

For their part, respondents, as indicated, rely upon the opinion of Judge Learned Hand in *Otten v. Baltimore and Ohio R. Co.*, 205 F. 2d 58. Petitioners have already treated at some length, at pages 26-28 of their Petition, what they regard as the manifest errors in that opinion. Respondents specifically refer to Judge Hand's observation that the results of the case before him would be different if the law of New York forbade the union shop. They rely upon this as a foundation of their point that the union shop is lawful at common law in California, the jurisdiction in which this case arose, so that the Union Shop Statute could not constitute an affirmative legalization in this case.

But this concession by Judge Hand, adopted by respondents, would result in an anomalous situation in which employees of the same railroad in a state with a right-to-work law could attack the Union Shop Statute on constitutional grounds while their co-workers in other states without such laws could not do so. Certainly such a situation could exist, if at all, only in the event that Section 2, Eleventh, were a mere *pro tanto* repeal of the previous ban on the union shop contained in Section 2, Fifth. But as we have seen, there is no warrant for treating Section 2, Eleventh, as a mere repealing statute in view of its preemption of the field and its affirmative legalization of a union shop contract—a preemption and a legalization effective in every state of the union and not merely in those where right to work laws are in force.

Respondents say, at page 19 of their brief, that even the Supreme Court of Nebraska recognized in *Hanson v. Union Pacific R. Co.*, 160 Neb. 669, before this Court on appeal as No. 451, *Railway Employees' Department v. Hanson*, that there would be no governmental action in a case such as this because a union shop is not unlawful under California law. But respondents are in error. All that the Nebraska Court said in the language quoted by them is that there would be no government action if Congress had merely repealed the restrictive provisions of the 1934 Amendment. The Nebraska Court actually recognized and held exactly what petitioners are contending, that is, that in the Union Shop Amendment Congress went much further than repealing the conflicting portions of Section 2, paragraphs Fourth and Fifth, of the Railway Labor Act.

In point of fact and law, petitioners submit that the affirmative authorization by Congress in favor of union shop agreements in the 1951 Amendment extended not only into states with right-to-work laws at the time of its enactment—and there were then approximately 12 states in that category—but into all other states as well. States without right-to-work laws in force in January, 1951, such as California and New York, were told by Congress in specific terms that they could not thereafter enact and enforce against railroads and railroad unions laws designed to protect workers from being compelled to join and support a labor union as a condition of employment.

Since the Union Shop Statute was enacted, some six additional states have passed right-to-work legislation. If only states with right-to-work laws in force when the Union Shop Statute was enacted were effected by its

terms, then it would seem that these laws subsequently enacted would be applicable notwithstanding the federal law. But, of course, Congress plainly sought to supersede them as well as laws in force when the Statute was passed. It is, therefore, entirely incorrect to say that the affirmative legalization of union shop agreements by the 1951 Amendment extended only into right-to-work states.

That there has been affirmative government action even in states without right-to-work laws is confirmed by a still different line of analysis. Prior to the Union Shop Statute, the contract of employment of every railroad worker in the United States contained an express covenant that he could hold his job without being required to join or pay money to a union, and without being required not to join or pay money to a union. (45 U. S. C. §152, Fourth, Fifth, Eighth.) That contract provision was in force in every state of the union, including states without right-to-work laws. But Congress has sought to abrogate that provision by the terms of the Union Shop Statute, and petitioners submit that that Congressional action extended into every state, including those without right-to-work laws. If Congress had taken no action which affected railroad workers in California, then they could still claim the protection of Section 2, Fourth and Fifth, of the Act.

And prior to the enactment of the Union Shop Amendment of 1951, no labor organization could discriminate against a worker on account of non-membership in a union. (*Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192; *Betts v. Easley*, 161 Kan. 159, 169 P. 2d 831.) Since the enactment of the Amendment, the power of a collective bargaining representative to practice this

discrimination and to deprive employees of their rights, if it exists at all, is derived from the terms of the Statute itself, assuming it to be valid. And that power is derived from the Statute no matter which state a union operates in, whether it be one with or one without a right-to-work law. The terms of the Statute necessary to effect the deprivation of rights are not those which amend Section 2, Fifth, and which Judge Hand, in *Otten v. Baltimore & Ohio R. Co.,* 205 F. 2d 58, said merely effect its *pro tanto* repeal, but the other provisions which affirmatively permit and therefore legalize the union shop, all other laws, state and federal, to the contrary notwithstanding.

Respondents' discussion of *Betts v. Easley,* 161 Kan. 159, 169 P. 2d 831, at page 20 of their brief, is inaccurate. They say that it oncerned "the exclusion from union membership of Negroes whose right to a job depended upon their maintaining . . . [union] membership." But that was not the case at all. It was an action by six Santa Fe employees who sought to enjoin officers of the Brotherhood of Railway Carmen from excluding them, as Negroes, from full participation in the union and from requiring that they belong to a segregated lodge. The trial court sustained a demurrer, holding that the actions complained of were those of a private association of individuals not subject to the restrictions of the Fifth Amenment. (169 P. 2d at 836.) In other words, the union officials involved in the *Betts* case made exactly the same argument advanced by respondents here, that is, that their actions are those of private individuals which give rise to no constitutional problems. But that argument was rejected by the Supreme Court of Kansas. Reversing the trial court's holding, it held that a union functioning under the provisions of the Railway Labor Act cannot be treated

as a mere association of private individuals; that while exercising rights incident to its designation as statutory exclusive bargaining agent a railroad union cannot avoid the responsibilities attaching thereto. It said:

> "In the light of the history and purpose of the [Railway Labor] Act, as construed in many decisions, the trial court's view that the acts complained of are solely those of 'a private association of individuals' is wholly untenable. The acts complained of are those of an organization acting as an agency created and functioning under provisions of Federal law. * * * While claiming and exercising rights incident to its designation as bargaining agent, the defendant union cannot at the same time avoid the responsibilities that attach to such statutory status." (169 P. 2d 838.)

Respondents' attempted distinction, at page 21 of their brief, of *Shelley v. Kraemer*, 334 U. S. 1; *Public Utilities Comm. v. Pollak*, 343 U. S. 451; and *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515, avoids the point for which each of these decisions were cited.

Shelley v. Kraemer restates the familiar doctrine that any form of governmental action, whether express, direct, indirect, or permissive, is sufficient to raise questions under the Bill of Rights. It destroys respondents' premise that only direct government action gives rise to constitutional problems.

The *Pollak* case makes it plain that permissive government action sanctioning conduct otherwise private in character makes that action subject to constitutional test. With reference to the *Pollak* case, respondents state that this Court observed therein that it "relied particularly upon the fact that an order had been issued by the [Public

Utilities] Commission." What respondents conspiciously avoid facing up to is the fact that the order of the Commission required no affirmative action. All the Commission did in the order referred to was decline to interfere with the Capital Transit Company's practice of receiving radio broadcasts on its trolleys. If the mere issuance of such an order by the Public Utilities Commission of the District of Columbia constituted sufficient government action to bring into play the First and Fifth Amendments, as respondents say was the case in *Pollak*, then *a fortiori* there is government action here where rather than issuance of a mere order by a government agency the Court is faced with "issuance" of a statute by Congress affirmatively authorizing execution and enforcement of the very union shop agreements complained of.

Respondents seek to distinguish the *Virginian* case on the ground that it involved direct governmental action against a carrier requiring it to bargain with respect to wages, hours, and working conditions. They say that the union shop agreements involved here were not the direct result of any requirement of the Statute. But what they overlook is that the contracts involved here followed upon the mandatory bargaining provisions of the Railway Labor Act coupled with the provisions of the Union Shop Statute. We submit that if compulsory bargaining for wages, hours, and working conditions, such as was involved in the *Virginian* case, raises constitutional questions, then questions under the Bill of Rights are most assuredly presented here where the subject is compulsory bargaining for compulsory unionism.

Respondents proceed to deal with what they state to be petitioners' argument construing the statute as if it were a direct compulsion by Congress of union member-

ship. They say, at page 22 of their brief, that a federal statute does not become "the equivalent of a law directly requiring union membership simply because it permits private parties to make an agreement containing such a requirement."

The mistake which respondents make here is in assuming (1) that the union shop contract in this case must be tested against the guarantees of the Bill of Rights only if it can be said to be the result of a law expressly requiring compulsory union membership, so that (2) immunity from such a test is conferred by the permissive form of the Union Shop Statute and by the fact that the compulsory membership or payment arrangement is put into effect by an agreement between private parties. But the parties are not strictly private; they are quasi-public in view of the powers conferred upon them by law.

Even if the parties should be private, the agreement between them is not immune from review under the Bill of Rights if governmental action is *in some way* involved in its authorization, in its making, or in its enforcement —as is here the case. To hold otherwise would be to overrule *Shelley v. Kraemer,* 334 U. S. 1, and *Barrows v. Jackson,* 346 U. S. 249, and every other modern case involving racial restrictive covenants.

Nor does the permissive form of the statute allow what the respondents have done to escape the test of the Bill of Rights. Their argument to the contrary ignores the settled proposition that indirect government action in the form of permissive authority or sanction gives rise to constitutional questions. In other words, it is settled that neither Congress nor any other branch of the federal government need expressly require or direct action to

be taken before it is subject to the restrictions of the Bill of Rights. It is enough that the action complained of be sanctioned *in some way* by government—that the hand of government be found on the scales. (*American Communications Assn. v. Douds,* 339 U. S. 382, 401.)

For example, let us suppose *arguendo* that Congress amended the Railway Labor Act so as to "permit" collective bargaining agreements discriminating against Negroes. Could it be imagined that this Court would hold that a discriminatory contract flowing from such a statute would not be subject to constitutional limitations simply because of the permissive phraseology of the statute. Certainly not. This Court specifically said, in *Steele v. Louisville & Nashville R. Co.,* 323 U. S. 192, 198-199, that constitutional issues would be presented in such a situation.

In conjunction with the *Steele* case, we may appropriately observe that it is only by rejection of what this Court there said that respondents can succeed in their contention that there is no government action in this case.

Judge Hand, in the *Otten* case, sought to distinguish *Steele* on the ground that in *Steele* the Negro employees were excluded from union membership whereas substantial concessions were made to Otten to induce him to join the union. But that is a distinction without a difference. The Negroes in *Steele* were not complaining about being excluded from the union—their complaint related to an agreement negotiated by the union empowered to bargain on their behalf which discriminated against them. Here and in *Otten* the situation is exactly the same. Petitioners and Otten find themselves confronted with a union shop contract entered into by the unions vested by the Railway Labor Act with exclusive power to bargain for them.

The contract discriminates against them because they are not union members, just as the contract in *Steele* discriminated against the Negroes on account of their race.

By reference, at pages 22-23 of their brief, to collective agreements covering wages which necessarily destroy the power of individual employees in the bargaining unit to negotiate separate wage agreements with their employers, the unions are contradicting what was said in this Court's decision in *Lincoln Union v. Northwestern Co.*, 335 U. S. 525. It was there held that the right to bargain collectively and impose the resultant wage scale upon a non-union man could not be construed to go so far as to include a right to force him into membership or out of work. Consequently, the fact that a union may impose a wage scale it has secured on all workers in a bargaining unit is irrelevant to the question whether a union can force all non-members either to join or support it or be fired from their jobs.

At page 25 of their brief, respondents argue that neither the Union Shop Amendment nor the agreements involved in this case have presented petitioners from working for their railroad employers. The only obstacle in petitioners' way, respondents say, is their own unwillingness either to join the union or pay initiation fees, dues and assessments.

All this amounts to, however, is saying that Congress, the unions, and the railroads have done nothing—the fault is all with petitioners. Although we believe the fallacy in this to be so apparent as to excuse reply, we may appropriately cite *Board of Education v. Barnette*, 319 U. S. 624, wherein a pupil in a public school was expelled for refusal to salute the American flag as re-

quired by a resolution of the local board of education. Respondents apparently would have argued there that it was not the board of education which kept the Barnette child from going to school but simply the child's refusal to salute the flag as required by the board.

In *Barnette* a child was expelled from school because his religion would not allow him to give the compulsory salute to the flag. In this case, petitioners, unless granted relief by this Court, will be fired from their jobs because their religion will not allow them to join or pay their money to a labor union. Wherein lies the difference? It is respectfully submitted that there is none.

Respondents go on to point up, at page 26 of their brief, that by a special supplemental agreement the railroads and the unions here undertook to excuse petitioners from all obligations of membership save payment of initiation fees, dues, and assessments. But this does not meet the fact that, unorthodox as some may think they are, petitioners' religious beliefs preclude their contributing money to respondents. Requiring them to pay such sums violates their religious beliefs just as much as membership in the fullest sense. And who is to say, in such areas, what is to be regarded as orthodox or unorthodox? (*Board of Education v. Barnette, supra,* at 642.)

Surely, it is difficult, religious considerations aside, to brand as unreasonable the refusal of petitioners to pay such sums as may be demanded by respondents. Neither the amount of such exactions nor the manner in which they may be spent are subject to regulation or supervision. These respondents do not confine themselves to collective bargaining but engage in many other activities, including very aggressive political ventures, the insurance business, publishing and disseminating papers,

booklets, and magazines, and assorted social activities. Petitioners, like others forced to pay their money to a labor union, are afforded no safeguards against abuse of their money through uses foreign to collective bargaining. What happens when a union uses money paid into it to advocate and support political, charitable, and other causes with which those who have have paid the money disagree? When union membership or support is a voluntary matter the individual can resolve such problems to his own satisfaction by getting out of the union, or by stopping his payments to it. But under the arrangement between respondents and the railroads in this case such relief is foreclosed.

Respondents, in closing their brief, quote the statement of the District Court that even if governmental action be assumed still petitioners cannot invoke the First Amendment's guarantee of freedom of religion here because, "That Amendment protects against prohibitions." Petitioners have already pointed out the error of this at pages 41-42 of their Petition for Certiorari and need not repeat what was said there.

Wherefore, petitioners believe that this Court should afford them relief as prayed for in their Petition for Certiorari or in their Petition for Writ of Mandamus.

Respectfully submitted,

HILL, FARRER & BURRILL,
CARL M. GOULD,
RAY L. JOHNSON, JR.,
Attorneys for Petitioners.